

DEPARTMENT OF THE INTERIOR
National Park Service
36 CFR Part 18
RIN 1024-AC78

Leasing Regulations
AGENCY: National Park Service, Interior.
ACTION: Final rule.

SUMMARY: This rule amends current National Park Service (NPS) regulations (36 CFR part 18) concerning the leasing of historic properties within areas of the national park system to encompass additional types of properties as authorized by law and to change in certain respects the procedural requirements for leasing of properties. This rule was published for public comment in the Federal Register on December 12, 2000 (65 FR 77538).

EFFECTIVE DATE: January 28, 2002.

FOR FURTHER INFORMATION CONTACT: Cindy Orlando,
National Park Service, 1849 C Street, NW., Room 7311, Washington DC
20240 (202/565-1212).

SUPPLEMENTARY INFORMATION: Section 802 of the National Parks Omnibus Management Act, Pub. L. 105-391 (Section 802), authorizes NPS to grant leases for the use of buildings and associated property located within areas of the national park system to persons and governmental entities under certain conditions. This new leasing authority supplements existing NPS leasing authority concerning historic properties set forth in 16 U.S.C. 470h-3 and implemented in 36 CFR part 18. This amendment of 36 CFR part 18 combines in one regulation the leasing authority provided by Section 802 with the leasing authority provided by 16 U.S.C. 470h-3. In general, this rule permits NPS to lease buildings, lands associated with such buildings, and, historic land located within the boundaries of park areas. It does not permit the leasing of non-historic land.

This amendment of 36 CFR part 18 achieves simplification of the NPS historic leasing process as also called for by Section 802 and expands the scope of NPS leasing authority to all eligible properties. NPS also has authority to lease certain property located within units of the national park system under 16 U.S.C. 460l-22(a). This authority is implemented by NPS in 36 CFR part 17 which remains unchanged by the amended 36 CFR part 18. Eight public comments were received in response to the proposed rule. Several changes were made in response to them. In addition, the final rule contains a number of editorial changes and clarifications.

Section Content

The following discussion describes the general content of each section of the final regulation. Public comments on these sections are also addressed as appropriate.

Section 18.1

Authority and Purposes. Section 18.1 describes the authority for the rule. The basic authority is 16 U.S.C. 1 et seq., (the National Park Service Organic Act), particularly 16 U.S.C. 1a-2(k) (the general

NPS leasing authority contained in section 802 of Pub. L. 105-391), and 16 U.S.C. 470h-3 (government-wide leasing authority applicable to historic properties). NPS has included a "grandfather" provision in this section of the final regulation to permit the execution of proposed leases that were solicited under 36 CFR part 18 prior to the effective date of this part. In response to comments, NPS has clarified the particular categories of NPS property to which this part applies. In addition, NPS notes that although this part is couched in terms of leasing particular properties, nothing in this part precludes NPS from leasing a number of properties in a combined solicitation or from engaging management companies (where otherwise authorized) to assist in implementing an appropriate overall park area leasing program in accordance with the terms of this part.

Section 18.2

Section 18.2 defines the terms used in the proposed rule. NPS has clarified the definition of "associated property" in the final regulation to make clear that associated property may relate to one or more buildings. NPS has also clarified the definition of "fair market value" by making clear that the particular terms and conditions of the lease being offered are to be taken into account in determining the fair market value of the lease. Finally, NPS has clarified the definitions of property types as used in the regulation and added a definition of non-historic property as a clarification. A comment asked whether a limited liability company qualifies as a "person" for purposes of this part. It does. A comment suggested that the definition historic property be expanded to include properties determined historic by state or local governments. NPS notes that the definition used is statutory and, in any event, includes properties of state or local significance listed in the National Register of Historic Places.

Section 18.3

Section 18.3 describes the types of property that NPS may lease under this part. In general, this part applies to leases of both historic and non-historic property located within the boundaries of park areas. However, Section 18.3(b) makes clear that non-historic land, i.e., vacant land that is not located within the boundaries of an historic district, may not be leased under this part. This is because of the express limitations on the types of property that may be leased under the authorities for this part. However, certain types of vacant land located in eligible units of the national park system may be leased under 36 CFR part 17.

Section 18.4

Section 18.4 describes the types of determinations NPS must make before it may lease property under this part. Before leasing property under this part, NPS must determine that the lease: (1) Will not result in degradation of the purposes and values of the park area; (2) will not deprive the park area of property necessary for appropriate park protection, interpretation, visitor enjoyment, or administration of the park area; (3) contains such terms and conditions as will assure the leased property will be used for an activity and in a manner that is consistent with the purposes established by law for the park area in which the property is located; (4) is compatible with the programs of the National Park Service; (5) is for rent at least equal to the fair market value rent of the leased property as described in Section 18.5; (6) does not authorize activities that are subject to authorization

through a concession contract, commercial use authorization or similar instrument; and (7), if the lease is to include historic property, that the lease will adequately insure the preservation of the historic property.

With respect to the first determination, NPS considers the term "degradation" of park area purposes and values (a term which tracks the provisions of Section 802) to provide the same protective standard as the terms "derogation" and "impairment" of park area resources as used in other NPS authorities.

A comment suggested that distinctions be made between the types of determinations necessary for "big" leases and "small" leases. However, NPS considers that the determinations required by this section are necessary for all leases, noting that a "small" lease may have a significant impact on park area resources.

Section 18.5

Section 18.5 describes the rent NPS must receive for property leased under this part. The rent must be at fair market value, determined after taking into account any restrictions NPS may place on the use of the leased property and any requirements for rehabilitation and maintenance of the leased property. The final regulation has been clarified in this respect. Comments suggested that consideration of year round occupancy, educational or governmental purposes be taken into account when determining fair market value rent. The regulation, however, does not preclude consideration of any relevant factor in determining fair market value. Another comment suggested that the regulation should provide authority for NPS to waive the fair market value rent requirement. NPS does not consider that this is within its leasing authority or otherwise appropriate. However, in response to a comment, NPS notes that cooperative agreements with non-profit organizations otherwise authorized by law may provide for assignment of government property to the cooperator without requiring the payment of fair market value rent. Such agreements are outside the scope of this regulation. A comment asked for examples as to the types of restrictions on use of the property that may reduce its fair market value. Examples are where NPS may not permit a property to be used for industrial purposes or may require that a property be used for educational purposes in the circumstances of a particular park area.

Section 18.6

Section 18.6(a) describes the types of uses that are permissible for property leased under this part. In general, leased property may be used for any lawful purpose subject to the determinations called for in Section 18.4. These uses may include, among others, office or other commercial uses. Innovative uses that are consistent with the requirements of this part are encouraged. Section 18.6(b) states that a lease issued under this part may not authorize the lessee to engage in activities that are subject to authorization through a concession contract, commercial use authorization or similar instrument. Proposed lease activities are subject to authorization under a concession contract if the Director determines in accordance with 36 CFR part 51 and park area planning documents and related guidelines and policies that the proposed activities meet applicable requirements for issuance of a concession contract. Proposed activities are subject to authorization under a commercial use authorization if the Director determines in accordance with park area planning documents and related guidelines and policies that the proposed activities meet applicable requirements for issuance of a commercial use authorization.

Section 18.7

Section 18.7 describes the procedures for leasing property through a public bid process. The bid process may only be used if the amount of rent is the sole criterion for award of a lease. The bid process calls for public notice of the lease opportunity, submission of offers on a date certain, and a public bid opening and selection by NPS. One comment suggested that award of leases under a bid system should be eliminated and another suggested an informal process that does not require publication or the submission of bids. NPS considers that the public bidding procedures of this section are appropriate. Another comment suggested that the bid system should not be used to lease historic property. NPS considers that the bid process will not be frequently utilized. However, it wishes to retain the flexibility to do so in appropriate circumstances. For example, short-term leases of historic farmland for agricultural purposes may most efficiently be awarded through the bid process. Another comment in effect asked for further guidance on how general federal historic preservation requirements and procedures (e.g., 36 CFR part 800) apply to the leasing of historic property under this part. This is a subject that is beyond the scope of these regulations. However, 36 CFR part 800 discusses these matters in detail. NPS, in response to a comment, has added a financial capability determination as a request for bids requirement.

Section 18.8

Section 18.8 describes the procedures for leasing property through a proposal solicitation process. In general, the proposal solicitation process calls for public issuance of a Request for Proposals ("RFP") that describes the leasing opportunity and the criteria for selection. After submission of proposals, NPS will select the best proposal upon application of established selection criteria. These include the compatibility of the proposal to the park area and its visitors, the experience and financial capability of the offeror, and the ability and commitment of the offeror to conduct its activities in an environmentally enhancing manner.

One comment suggested that the publication period for the solicitation should be reduced to thirty days. However, the regulation permits the sixty-day publication period to be shortened in appropriate circumstances. Another comment suggested that the rent offered be a separate selection factor. NPS does not consider this to be appropriate and that it would be difficult to administer. A comment suggested that the "tie-breaker" standard contained in Section 18.8(f) be eliminated. NPS has changed the "tie-breaker" standard to a more general determination as to which proposal is the most beneficial on an overall basis. A comment also suggested that the regulations include a "best and final offer" provision. NPS, however, considers that the process described for proposal amendment is efficient and provides to the extent appropriate an equivalent of a "best and final offer" procedure in the event that two or more proposals are considered as substantially equal. A comment suggested that the "specified" period of time for negotiation of a final lease be changed so as to allow an unlimited period for negotiation, subject to termination by NPS. NPS considers that requiring a specified negotiation period (which is subject to extension by NPS) is a more effective means to conclude the negotiation in a timely manner. Another comment suggested that the regulation reference the ability of NPS to enter into exclusive negotiating agreements with the successful offeror. NPS has included

reference to such agreements in Section 18.8(d) in the form of a letter of intent to negotiate.

Section 18.9

Section 18.9 permits NPS to lease property to non-profit organizations and governmental units without competitive procedures if NPS determines that the non-profit or governmental use of the property will contribute to the purposes and programs of the park area. This is a clarification of the proposed regulation that stated that such leases could be entered into when it is in the public interest to do so. NPS considers this authority necessary for appropriate implementation and integration of park area management and leasing program objectives.

A comment suggested that the authority for non-competitive award of leases should only apply when no proposals were received in response to a competitive solicitation. NPS considers this limitation too restrictive in light of NPS program needs and objectives. Another comment suggested that there should be authority to award leases non-competitively with private property owners. NPS, however, does not consider this to be consistent with its general policy of competitive leasing procedures. A comment misunderstood this section as permitting receipt of less than fair market value rent and suggested that "small" leases should be awarded through informal processes. Fair market value rent is required under this section. NPS considers that the formal leasing processes required by this part are necessary for effective implementation of NPS authorities.

Section 18.10

Section 18.10 describes the term of leases to be granted under the authority of this part. The term is to be no more than 60 years. Several comments suggested a longer-term limitation or no limitation at all. However, it has been the experience of NPS that a lease term of sixty years (or less) is sufficient for investment purposes (the maximum sixty year term permits two thirty year mortgage periods) and that a transaction that is seen to need a longer term to be successful is not likely to be viable in the first instance. NPS notes the provisions of Title IV of the National Parks Omnibus Management Act of 1998 that limits the term of concession contracts to twenty years (reduced from thirty years under prior legislation) and which states that concession contracts should be for the shortest possible term. NPS considers that this statement of Congressional policy is equally applicable to leases. Another comment suggested specific terms for leases for historic property. NPS does not consider the inclusion of specific terms to be appropriate as the property's historic character will be taken into account when determining the lease term. Other comments suggested that NPS should have the authority to extend leases. However, NPS in general considers extensions to be anti-competitive and that they may result in leases that extend beyond any reasonable period of time to the detriment of the government. NPS, however, has added language to the final regulation that permits leases to be extended for up to one year if required by circumstances beyond the control of NPS. This is consistent with similar provisions contained in the concession contracting provisions of Title IV of the National Parks Omnibus Management Act of 1998 that permit short term extensions of concession contracts in limited circumstances.

Section 18.11

Section 18.11 describes the general terms and conditions that a lease granted under authority of this part must contain. These include provisions that assure use of the property in a manner consistent with the purposes of the applicable park area, and, if applicable, the preservation of historic property that may be leased.

Section 18.12

Section 18.12 describes a number of specific terms and conditions that a lease granted under the authority of this part must contain. These include a termination for cause provision, a clause requiring the lessee to maintain the leased property, provisions regarding the use of the leased property, and, provisions that state that any improvements a lessee may make may only be undertaken with the approval of NPS. 18.12(c). A comment suggested that Section 18.12(c) should be amended to delete the mandatory reference to subleases with respect to financial capability determinations. NPS does not agree with this suggestion as sublessees are, as a practical matter, the lessee of a specified portion of the leased property and therefore should be financially capable to carry out applicable terms of the lease.

18.12(d). NPS deleted reference to the disposition of insurance proceeds in this section. The terms of specific leases will address this subject. It also deleted specific reference to replacement cost insurance in response to a comment.

18.12(g). A comment suggested that fees NPS may collect from lessees for services provided by NPS be referenced in this section. NPS, however, does not consider that reference to such fees is appropriate as such fees, if any, are variable and implemented on a park by basis. Another comment suggested that Section 18.12(g) be amended to delete the reference to lease termination with respect to compensation for improvements. NPS deleted this provision in its entirety from the regulation as unnecessary in light of general legal limitations on the authority of NPS to contractually obligate the expenditure of unappropriated funds.

18.12(h). The provisions regarding lease extensions and renewal rights have been deleted from this subsection as redundant. A comment suggested that the reference in this subsection to the sovereign authority of the government to cancel leases may preclude a lender from obtaining a reinstated lease in the event of foreclosure and thus make the lease unfinanceable. However, this subsection does not preclude this right in the event of lease foreclosure.

18.12(i). A comment suggested that leases should permit new construction in park areas. NPS considers that the terms of this subsection, which do permit new construction in park areas in limited circumstances, are necessary in order to avoid impairment of park area resources and values.

18.2(m). A comment suggested modifying the term "obligations" in this subsection by the term "monetary." However, this "subject to availability of appropriated funds" clause is a standard provision contained in government contracts.

Section 18.13

Section 18.13 describes the information collection requirements of the rule. A comment suggested that 40 hours for preparing a large lease proposals seems low. NPS notes that the time estimates are averages only.

Drafting Information

The primary authors of this rule are the members of a task force comprised of NPS officials involved in the leasing of national park system properties.

Compliance With Laws, Executive Orders and Departmental Policy Regulatory Planning and Review (E.O. 12866)

This rule is a significant rule within the meaning of Executive Order 12866 because of novel policy issues.

a. This rule will not have an annual economic effect of \$100

million or more or adversely affect an economic sector, productivity, jobs, the environment or other units of government. The rule imposes no obligations on any entity except for persons that may seek to be awarded an NPS lease. It does not apply to existing NPS leases.

b. This rule will not create inconsistencies with other agencies' actions as it only applies to the National Park Service.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. The rule only prescribes policies and procedures for leasing lands of the national park system.

d. This rule raises novel policy issues as it prescribes new policies and procedures for leasing lands of the national park system in accordance with the requirements of Section 802 of Public Law 105-319 and 16 U.S.C. 470h-3.

Regulatory Flexibility Act

This rule is not subject to the Regulatory Flexibility Act as it is not required to be published for comment before adoption by 5 U.S.C. 553 or other law. NPS solicited public comment on this proposed rule as a matter of policy. The Department of the Interior also considers that the final rule will not have a significant effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C 601 et seq.). NPS anticipates that less than one hundred leases a year will be awarded under this authority. In addition, the rule is only applicable to prospective lessees. It has no effect on existing NPS leases.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Fairness Enforcement Act. This rule does not have an annual effect on the economy of \$100 million or more; will not cause a major increase in costs or prices for consumers, individual entities, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The primary effect of the proposed rule is to establish policies and procedures for the granting of leases of certain property located within areas of the national park system. Potential lessees will only submit lease proposals if the effects are positive.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have significant takings implications as this rule does not apply to private property. A takings assessment is not required.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The rule imposes no requirements on any governmental entity other than NPS.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does not meet the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule (NPS Leasing Regulations—36 CFR part 18) requires an information collection from ten or more parties so a submission under the Paperwork Reduction Act was required. OMB has approved the information collection requirements of this part. OMB Control No. 1024-0223, expiration date 01/31/2004. The information collection requirements of this rule are for the purpose of awarding and administering NPS leases. A federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Six categories of information collection are contained in the rule: Section 18.7 (Request for Bids); Section 18.8 (Requests for Qualifications/Proposals); Section 18.12(c) (Subletting and Assignment of Leases); Section 18.12(i)-(j) (Approval of Lessee Construction/Demolition); Section 18.12(l) (Approval of Lessee Encumbrances); and Section 18.12(k) (Amendment of Leases). NPS will use the information collected to make administrative decisions with respect to these six categories. The respondents to these collections will be NPS lessees and prospective NPS lessees. NPS anticipates that there will be a total of approximately six hundred respondents per year with respect to Sections 18.7 and 18.8 and a total of approximately twenty-seven respondents per year with respect to the other information collection categories. NPS estimates that the total annual reporting and recordkeeping burden that will result from these collections of information will be 4392 hours, as set forth in the following chart.

Section	No. of responses	Hours per response	Total hours
Section 18.7	200	1	200
Section 18.8	20	40	800
Section 18.8—Simple	380	8	3040
Section 18.12(c)—Complex	1	40	40
Section 18.12(c)—Simple	4	8	32
Section 18.12(i)-(j)—Complex	2	32	64
Section 18.12(i)-(j)—Simple	8	8	64
Section 18.12(k)	2	4	8
Section 18.12(l)—Complex	2	40	80
Section 18.12(l)—Simple	8	8	64
Total	627	7.0	4392

*(average)

Please send comments regarding this burden or estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (with a copy to the Information Collection Officer, National Park Service, 1849 C Street, Washington, DC 20240. information technology).

This rule does not constitute a major federal action affecting the quality of the human environment. A detailed statement under the National Environment Policy Act is not required. The rule will not increase public use of park areas, introduce noncompatible uses into park areas, conflict with adjacent land ownerships or land uses, or cause a nuisance to property owners or occupants adjacent to park areas. Accordingly, this rule is categorically excluded from procedural requirements of the National Environmental Policy Act by 516 DM 6, App. 7.4A(10).

Clarity of this Rule

Executive Order 12866 requires federal agencies to write regulations that are easy to understand. Comment is invited on how to make this rule easier to understand, including answers to the following questions: (1) Are the requirements in the rule clearly stated?; (2) Does the rule contain undefined technical language or jargon that interferes with its clarity?; (3) Does the format of the rule (groupings and order of sections, use of headings, paragraphing, etc.) aid in or reduce its clarity?; (4) Would the rule be easier to understand if it were divided into more but shorter sections?; (5) Is the description of the rule in the Supplementary Information section of the preamble helpful in understanding the proposed rule?; (6) What else could be done to make the rule easier to understand? Please send a copy of any comments that concern how this rule could be made easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240.

List of Subjects in 36 CFR Part 18

Historic preservation, National parks.

In consideration of the foregoing, 36 CFR part 18 is revised to read as follows:

PART 18—LEASING OF PROPERTIES IN PARK AREAS

Sec.

- 18.1 What is the authority and purpose for this part?
- 18.2 What definitions do you need to know to understand this part?
- 18.3 What property may be leased?
- 18.4 What determinations must the Director make before leasing property?
- 18.5 May property be leased without receiving fair market value rent?
- 18.6 Are there limitations on the use of property leased under this part?
- 18.7 How are lease proposals solicited and selected if the Director issues a Request for Bids?
- 18.8 How are lease proposals solicited and selected if the Director issues a Request for Proposals?
- 18.9 When may the Director lease property without issuing a request for bids or a request for proposals?
- 18.10 How long can the term of a lease be?
- 18.11 What general provisions must a lease contain?
- 18.12 What specific provisions must a lease contain?

Authority: 16 U.S.C. 1 et seq., particularly 16 U.S.C. 1a-2(k), and, 16 U.S.C. 470h-3.

Sec. 18.1 What is the authority and purpose for this part?

16 U.S.C. 1 et seq., particularly 16 U.S.C. 1a-2(k), and, 16 U.S.C. 470h-3 are the authorities for this part. These authorities allow the Director (or delegated officials) to lease certain federally owned or administered property located within the boundaries of park areas. All leases to be entered into by the Director under these authorities are subject to the requirements of this part, except that, proposed leases that were solicited pursuant to this part prior to January 28, 2002, may be executed in accordance with the terms of the solicitation.

Sec. 18.2 What definitions do you need to know to understand this part?

In addition to the definitions contained in 36 CFR Part 1, the following definitions apply to this part:

(a) Associated property means land and/or structures (e.g., parking lots, retaining walls, walkways, infrastructure facilities, farm fields) related to a building or buildings and their functional use and occupancy.

(b) Building means an enclosed structure located within the boundaries of a park area and constructed with walls and a roof to serve a residential, industrial, commercial, agricultural or other human use.

(c) Commercial use authorization means a written authorization to provide services to park area visitors issued by the Director pursuant to Section 418 of Public Law 105-391 and implementing regulations.

(d) Concession contract has the meaning stated in 36 CFR part 51.

(e) Fair market value rent means the most probable rent, as of a specific date, in cash or in terms equivalent to cash, for which the property to be leased, under the terms and conditions of the lease, should rent for its highest and best permitted use after reasonable exposure in a competitive market under all conditions requisite to a fair leasing opportunity, with the lessor and the lessee each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress. Determinations of fair market value rent under this part are to be made taking into account the considerations stated in Sec. 18.5.

(f) Historic building means a building or buildings located within the boundaries of a park area if the building is part of a pre-historic or historic district or site included on, or eligible for inclusion on, the National Register of Historic Places.

(g) Historic land means land located within the boundaries of an historic property.

(h) Historic property means building(s) and land located within the boundaries of a park area if the building(s) and land are part of a pre-historic or historic district or site included on, or eligible for inclusion on, the National Register of Historic Places.

(i) Land means unimproved real property.

(j) Lease means a written contract entered into under the authority of this part through which use and possession of property is granted to a person for a specified period of time.

(k) Non-historic building is a building (or buildings) and its associated property located within the boundaries of a park area but not part of a pre-historic or historic district or site included on, or eligible for inclusion on, the National Register of Historic Places.

(l) Non-historic land means land located within the boundaries of a park area that is not associated property and is not part of a pre-historic or historic district or site included on, or eligible for inclusion on, the National Register of Historic Places.

(m) Non-historic property means building(s) and/or land that are located within the boundaries of a park area but are not part of a pre-historic or historic district or site included on, or eligible for inclusion on, the National Register of Historic Places.

(n) Park area means a unit of the national park system.

(o) Property means both historic and non-historic property that is located within the boundaries of a park area and is federally owned or administered.

(p) Request for bids refers to the lease bid process described in Sec. 18.7.

(q) Request for proposals refers to the lease proposal process described in Sec. 18.8.

(r) Responsive bid or proposal means a timely submitted bid or proposal that meets the material requirements of a request for bids or a request for proposals.

Sec. 18.3 What property may be leased?

(a) In general. The Director may lease any property (except non-historic land) under this part if the Director makes the determinations required by Sec. 18.4.

(b) Non-historic land. Non-historic land may not be leased under this part. Certain non-historic land is eligible for leasing under 36 CFR part 17.

Sec. 18.4 What determinations must the Director make before leasing property?

Before leasing property in a park area under this part, the Director must determine that:

(a) The lease will not result in degradation of the purposes and values of the park area;

(b) The lease will not deprive the park area of property necessary for appropriate park protection, interpretation, visitor enjoyment, or administration of the park area;

(c) The lease contains such terms and conditions as will assure the leased property will be used for activity and in a manner that are consistent with the purposes established by law for the park area in which the property is located;

(d) The lease is compatible with the programs of the National Park Service;

(e) The lease is for rent at least equal to the fair market value rent of the leased property as described in Sec. 18.5;

(f) The proposed activities under the lease are not subject to authorization through a concession contract, commercial use authorization or similar instrument; and

(g) If the lease is to include historic property, the lease will adequately insure the preservation of the historic property.

Sec. 18.5 May property be leased without receiving fair market value rent?

Property may be leased under this part only if the lease requires payment of rent to the government equal to or higher than the property's fair market value rent. The determination of fair market value rent shall take into account:

(a) Any restrictions on the use of the property or terms of the lease that limit the value and/or the highest and best use of the property; and

(b) Any requirements under the lease for the lessee to restore, rehabilitate or otherwise improve the leased property.

Sec. 18.6 Are there limitations on the use of property leased under this part?

(a) A lease issued under this part may authorize the use of the leased property for any lawful purpose, subject to the determinations

required by Sec. 18.4 and the limitations on activities set forth in paragraph (b) of this section.

(b) Unless otherwise authorized by law, a lease issued under this part may not authorize the lessee to engage in activities that are subject to authorization through a concession contract, commercial use authorization or similar instrument. Proposed lease activities are subject to authorization under a concession contract if the Director determines in accordance with 36 CFR part 51 and park area planning documents and related guidelines and policies that the proposed activities meet applicable requirements for issuance of a concession contract. Proposed activities are subject to authorization under a commercial use authorization if the Director determines in accordance with park area planning documents and related guidelines and policies that the proposed activities meet applicable requirements for issuance of a commercial use authorization.

Sec. 18.7 How are lease proposals solicited and selected if the Director issues a Request for Bids?

(a) If the amount of the rent is the only criterion for award of a lease, the Director may solicit bids through issuance of a request for bids as described in this section. If historic property is to be leased under the authority of this section, the Director must comply with 36 CFR part 800 (*commenting procedures of the Advisory Council on Historic Preservation*) at an appropriate time during the leasing process.

(b) A request for bids under this section shall be advertised by public notice published at least twice in local and/or national newspapers of general circulation. The notice shall provide at least a thirty (30) day period from the last date of publication for the submission of sealed bids. The notice will provide necessary information to prospective bidders. It may specify a minimum rent and/or require submission of a rent deposit or advance rent payment. Bids will be considered only if timely received at the place designated in the request. Bids must be in the form specified by the Director, or, if no form is specified, a bid must be in writing, signed by the bidder or authorized representative, state the amount of the bid, and refer to the applicable public notice. If the notice requires submission of a rent deposit or advance rent payment, the bids must include the required funds in the form of a certified check, post office money order, bank drafts, or cashier's checks made out to the United States of America. The bid (and payment where applicable) must be enclosed in a sealed envelope upon which the bidder shall write: "Bid on lease of property of the National Park Service" and shall note the date the bids are to be opened.

(c) Bids will be opened publicly by the Director at a time and place specified in the public notice. Bidders or their representatives may attend the bid opening. The bidder submitting a responsive bid offering the highest rent will be selected for award of the lease (subject to a determination of financial capability by the Director). A responsive bid is a bid that meets the material terms and conditions of the request for bids. The Director shall accept no bid in an amount less than the fair market rental value as determined by the Director. If two or more bids are equal, a drawing shall make the lease award by lot limited to the equal responsive bids received.

(d) When a property is to be leased through a request for bids, the bidder that is declared by the Director to be the high bidder shall be bound by his bid and this part to execute the offered lease, unless the bid is rejected. If the declared high bidder fails to enter into the lease for any reason, the Director may choose to enter into the lease with the next highest bidder (if that bidder offered to pay at least the fair market rent value). The Director may reject any and all bids in his discretion and resolicit or cancel a lease solicitation under this part at any time without liability to any person.

Sec. 18.8 How are lease proposals solicited and selected if the Director issues a Request for Proposals?

(a) When the award of a lease is to be based on selection criteria in addition to or other than the amount of the rent, the Director must, subject to Sec. 18.9, solicit proposals for the lease through issuance of a public Request for Proposals (RFP).

(b) An RFP may be preceded by issuance of a public Request for Qualifications (RFQ). The purpose of an RFQ is to select a "short list" of potential offerors that meet minimum management, financial and other qualifications necessary for submission of a proposal in response to an RFP. If the Director issues an RFQ, only persons determined as qualified by the Director under the terms of the RFQ shall be eligible to submit a proposal under the related RFP.

(c) The Director must provide public notice of the leasing opportunity by publication at least twice in local and/or national newspapers of general circulation and/or through publication in the Commerce Business Daily. The public notice shall contain general information about the leasing opportunity and advise interested persons how to obtain a copy of the RFP (or RFQ where applicable). The RFP (and RFQ where applicable) shall contain appropriate information about the property proposed for lease, including limitations on the uses of the property to be leased, information concerning the leasing process, information and materials that must be contained in a proposal, the time and place for submission of proposals, terms and conditions of the lease, and the criteria under which the Director will evaluate proposals. The RFP may state the fair market value rent as the minimum acceptable rent if determined by the Director at that time. The RFP (and RFQ where applicable) must allow at least sixty (60) days for submission of proposals (or qualifications under an RFQ) unless a shorter period of time is determined to be sufficient in the circumstances of a particular solicitation.

(d) The Director may determine that a proposal is non-responsive and not consider it further. A non-responsive proposal is a proposal that was not timely submitted or fails to meet the material terms and conditions of the RFP. After the submission of offers and prior to the selection of the best overall proposal, the Director may request from any offeror additional information or written clarification of a proposal, provided that proposals may not be amended after the submission date unless all offerors that submitted responsive proposals are given an opportunity to amend their proposals. The Director may choose to reject all proposals received at any time and resolicit or cancel a solicitation under this part without liability to any person.

(e) (1) The criteria to be used in selection of the best proposal are:

(i) The compatibility of the proposal's intended use of the leased property with respect to preservation, protection, and visitor enjoyment of the park;

(ii) The financial capability of the offeror to carry out the terms of the lease;

(iii) The experience of the offeror demonstrating the managerial capability to carry out the terms of the lease;

(iv) The ability and commitment of the offeror to conduct its activities in the park area in an environmentally enhancing manner through, among other programs and actions, energy conservation, waste reduction, and recycling; and

(v) Any other criteria the RFP may specify.

(2) If the property to be leased is an historic property, the comparability of the proposal with the historic qualities of the property shall be an additional selection criterion. If the RFP requires proposals to include the amount of rent offered, the amount of rent offered also shall be an additional selection criterion.

(f) The Director will evaluate all responsive proposals received. The responsive proposal determined by the Director to best meet on an

overall basis the evaluation criteria will be selected for negotiation of the lease. If two or more responsive proposals are determined by the Director to be substantially equal under the evaluation criteria, the Director shall provide an opportunity for those proposals to be amended by their offerors as necessary for the Director to select the best amended proposal. In such circumstances, the Director will provide each offeror that submitted a substantially equal proposal appropriate information as to how their proposals may be amended in order to enhance the possibility of selection as the best amended proposal. If two or more proposals remain as substantially equal after amendment, the Director will select for negotiation of the lease from among these proposals the proposal that the Director determines on an overall basis will be most beneficial to effective management of the park area.

(g) The Director will provide the offeror that submitted the best overall responsive proposal as determined by the Director a specified period of time to negotiate the final terms of the lease (and may enter into a letter of intent to negotiate in this connection). The final terms of the lease must be consistent with the requirements of the RFP. If the negotiations do not result in an executed lease within the specified time period, the Director, in his discretion, may extend the negotiation period, terminate negotiations and negotiate with the offeror that submitted the next best responsive proposal, or, cancel the solicitation.

(h) RFPs may state that the amount of rent to be paid will be negotiated subsequently with the offeror that submitted the best proposal, initially or as amended. The Director may execute a lease only if the Director determines that it requires the lessee to pay at least the fair market value rent of the leased property.

(i) The Director may execute a lease that includes historic property only after complying with 36 CFR part 800 (commenting procedures of the Advisory Council on Historic Preservation).

Sec. 18.9 When may the Director lease property without issuing a request for bids or a request for proposals?

The Director, except as provided in this section, may not lease property without issuing a request for bids or a request for proposals in compliance with Sec. 18.7 or Sec. 18.8. The Director under this part may enter into leases with non-profit organizations (recognized as such by the Internal Revenue Service) or units of government without complying with Sec. 18.7 or 18.8 if the Director determines that the non-profit or governmental use of the property will contribute to the purposes and programs of the park area. All other requirements of this part are applicable to leases entered into or to be entered into under authority of this section. The Director may enter into leases under this part with a term of sixty (60) days or less without complying with Sec. 18.7 or 18.8 if the Director determines that to do so is in the best interests of the administration of the park area. If historic land is to be leased under the authority of this section, the Director must comply with 36 CFR part 800 (commenting procedures of the Advisory Council on Historic Preservation) before entering into the lease.

Sec. 18.10 How long can the term of a lease be?

All leases entered into under this part shall have as short a term as possible, taking into account the financial obligations of the lessee and other factors related to determining an appropriate lease term. No lease shall have a term of more than 60 years. Leases entered under the authority of this part may not be extended, except that, leases with an initial term of one (1) year or more may be extended once for a period not to exceed one (1) additional year if the Director determines that an extension is necessary because of circumstances beyond the Director's control.

Sec. 18.11 What general provisions must a lease contain?

All leases entered into under this part must contain terms and conditions that are determined necessary by the Director to assure use of the leased property in a manner consistent with the purposes of the applicable park area as established by law, and where applicable, to assure the preservation of historic property.

Sec. 18.12 What specific provisions must a lease contain?

All leases entered into under this part must contain:

- (a) A termination for cause or default provision;
- (b) Appropriate provisions requiring the lessee to maintain the leased property in good condition throughout the term of the lease;
- (c) Appropriate provisions stating that subletting of a portion of the leased property and assignment of a lease, if permissible under the terms of the lease, must be subject to the Director's written approval. Such subleases and assignments shall be approved only if the Director determines, among other relevant matters, that the proposed sub-lessee or assignee is financially and managerially capable of carrying out the terms of the lease. Assignment of a lease for the purpose of effectuating an encumbrance to the lease or the leased property is subject to approval pursuant to the requirements of paragraph (l) of this section;
- (d) Appropriate provisions requiring the lessee to secure and maintain from responsible companies liability insurance sufficient to cover losses connected with or occasioned by the use and activities authorized by the lease. Types and amounts of insurance coverage will be specified in writing and periodically reviewed by the Director;
- (e) Appropriate provisions, unless the Director determines otherwise in the circumstances of a particular lease, requiring the lessee to obtain from responsible companies casualty insurance (including flood insurance if applicable) in an amount sufficient to protect the interests of the lessee and the government. In the event of casualty, the lessee shall be required to repair or replace damaged or destroyed property unless otherwise determined by the Director;
- (f) Appropriate provisions requiring the lessee to save, hold harmless, and indemnify the United States of America and its agents and employees for all losses, damages, or judgments and expenses resulting from personal injury, death or property damage of any nature arising out of the lessee's activities under the lease, and/or the activities of the lessee's employees, subcontractors, sub-lessees, or agents. No lease entered into this part may contain provisions intended to provide indemnification or other assurances to the lessee regarding the conduct or activities of the Director concerning the lease or the administration of the applicable park area. Leases may contain appropriate provisions that commit the Director to accept responsibility for tortious actions of government officials to the extent authorized by the Federal Torts Claim Act or as otherwise expressly authorized by law;
- (g) Appropriate provisions requiring the lessee to pay for use of all utilities used by the lessee and to pay all taxes and assessments imposed by federal, state, or local agencies applicable to the leased property or to lessee activities;
- (h) Appropriate provisions stating that the lessee has no rights of renewal of the lease or to the award of a new lease upon lease termination or expiration and that the lease is subject to cancellation by the Director in the exercise of the sovereign authority of the United States to the extent provided by applicable law;
- (i) Appropriate provisions stating that the lessee may not construct new buildings or structures on leased property, provided that, a lease may contain appropriate provisions that authorize the lessee to construct, subject to the prior written approval of the Director, minor additions, buildings and/or structures determined by the Director to be necessary for support of the authorized activities

of the lessee and otherwise to be consistent with the protection and purposes of the park area. Approval by the Director of new construction may only be granted if the Director makes the determinations required by Sec. 18.4;

(j) Appropriate provisions requiring that:

(1) Any improvements to or demolition of leased property to be made by the lessee may be undertaken only with written approval from the Director;

(2) That any improvements to or demolition of historic property may only be approved if the Director determines that the improvements or demolition complies with the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR part 68); and

(3) Any improvements made by a lessee shall be the property of the United States;

(k) Appropriate provisions that describe and limit the type of activities that may be conducted by the lessee on the leased property. The types of activities described in a lease may be modified from time to time with the approval of the Director through an amendment to the lease. The Director may approve modified activities only if the determinations required by Sec. 18.4 remain valid under the proposed modified activities and the proposed activities are otherwise determined appropriate by the Director;

(l) Appropriate provisions, unless the Director determines not to permit pledges or encumbrances in the circumstances of a particular lease, authorizing the lessee to pledge or encumber the lease as security, provided that any pledge or encumbrance of the lease and the proposed holder of the pledge or encumbrance must be approved in writing in advance by the Director and that a pledge or encumbrance may only grant the holder the right, in the event of a foreclosure, to assume the responsibilities of the lessee under the lease or to select a new lessee subject to the approval of the Director. Pledges or encumbrances may not grant the holder the right to alter or amend in any manner the terms of the lease;

(m) Appropriate provisions stating that fulfillment of any obligations of the government under the lease is subject to the availability of appropriated funds. No lease issued under authority of this part shall entitle the lessee to claim benefits under the Uniform Relocation Assistance Act of 1970 (Public Law 91-646) and all leases entered into under the authority of this part shall require the lessee to waive any such benefits; and

(n) Appropriate provisions granting the Director and the Comptroller General access to the records of the lessee as necessary for lease administration purposes and/or as provided by applicable law.

Dated: July 19, 2001.

Joseph E. Doddridge,

Acting Assistant Secretary for, Fish and Wildlife and Parks.

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